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Nos. 81-2245, 81-2276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEVADA,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,
v.
UNITED STATES OF AMERICA, and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT PYRAMID LAKE PAIUTE TRIBE OF INDIANS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a prior water rights adjudication bars one non-party from asserting a claim against another non-party when both non-parties were represented by the same government attorneys, there was no adversity between the two non-parties, neither the claim nor the underlying issue was actually litigated, and there was an obvious conflict between the interests of the two non-parties.

2. Whether a water rights agreement between the Secretary of the Interior and an entity representing the water users on a federal reclamation project which does not mention or refer to an Indian tribe's water right for fishery purposes bars the Tribe from asserting that claimed right and, if so, whether the Secretary is authorized to enter into such an agreement.

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BRIEF FOR RESPONDENT PYRAMID LAKE PAIUTE TRIBE OF INDIANS IN OPPOSITION

SUPPLEMENTAL STATEMENT OF THE CASE [1]

A. The Newlands Project's Water Rights and Their Impact on the Truckee River

The *Orr Ditch* decree declared the right of the United States to divert 1,500 cubic feet per second of Truckee River water for the irrigation of 232,800 acres of land

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[1] This Statement supplements the Statement of the Case in the Pyramid Lake Tribe's Cross-Petition for Certiorari, No. 82-38, which is incorporated by reference.

within the Newlands Project. This right was made subject to "such control, disposal and regulation as the plaintiff [United States] may make or desire" and was further limited to a water duty, "not [to] exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the bottom lands, [and] 4.5 acre feet per acre for the bench lands. . . ." Nev. App. 59a. This right has a priority of July 2, 1902 which is junior to virtually all of the other rights adjudicated in the *Orr Ditch* decree. App. 1a;[2] TCID Pet. 4.

During the period 1925 to 1967, the average annual flow of the Truckee River at the California-Nevada boundary, approximately 17 miles above Reno, was approximately 500,000 acre feet per year.[3] App. 2a. The flow at Derby Dam, 25 miles below Reno, was approximately the same, 475,000 acre feet. *Id.*[4] The total depletion from the Truckee River from all agricultural and municipal diversions in both California and Nevada above Derby Dam was less than 100,000 acre feet per year, while the average annual inflow from all tributaries and other sources between the state line and Derby Dam was approximately 75,000 acre feet per year. *Id.* By contrast, the average annual diversion of Truckee River water to the Newlands Project at Derby Dam exceeded 250,000 acre feet. *Id.* Almost all of the water diverted at Derby Dam is conveyed out of the Truckee River

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[2] "App." refers to the Appendix to this Brief. "TCID App." is the Appendix to TCID's Petition for Certiorari, No. 81-2276. "Nev. App." is the Appendix to Nevada's Petition, No. 81-2245.

[3] An "acre foot" is the volume of water which covers one acre one foot deep, approximately 325,000 gallons.

[4] Maps or sketches of the affected area are reproduced in Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 259 (D.D.C. 1973), and in United States v. Alpine Land & Reservoir Co., 431 F.2d 763, 765 (9th Cir. 1970), *cert. denied*, 401 U.S. 912.

watershed to the Carson River basin, so there is virtually no return flow to the Truckee River or Pyramid Lake.[5]

Thus, the Newlands Project has one of the most junior priorities on the Truckee River and the depletion from the river caused by its diversions are more than twice the combined total of all other Truckee River users in Nevada and California. A fifty percent reduction in diversions to the Newlands Project would provide sufficient water to maintain the present level of Pyramid Lake. App. 2a; Nev. App. 152a.

B. Proceedings Below

The Complaint of the United States in this case named petitioner State of Nevada as a party defendant in three capacities, proprietary, governmental, and as *parens patriae* for its citizens. Nev. App. 152a. Over the objections of the United States and the Tribe, the district court granted Nevada's motion to dismiss the State in its *parens patriae* capacity. App. 3a-6a.

The court of appeals cited several factors which would mitigate any hardship to Truckee-Carson Irrigation District (TCID) and the Newlands Project resulting from its decision. TCID App. A-55 to A-56. These factors include the availability of a damage remedy against the United States for breach of contract and the possibility of measures to conserve and make better use of water on the "relatively inefficient" project, citing *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 257 (D.D.C. 1973). TCID App. A-55 to A-56.

C. Related Cases Pending Before the Lower Courts

Since 1970, the Pyramid Lake Tribe has pursued two related legal approaches to obtain more water for Pyra-

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[5] Approximately 90% of the Newlands Project's irrigated acreage is located within the Carson River watershed below Lahonton Reservoir. *See* the map reproduced in Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 259 (D.D.C. 1973).

mid Lake and its beleaguered fishery. Through this case, it has sought to establish its reserved water right for fishery purposes under the Winters doctrine, *Winters v. United States*, 207 U.S. 564 (1908). In addition, it has initiated litigation and pursued other approaches aimed at requiring other parties to make more efficient use of available supplies, thereby reducing their diversions and enabling more Truckee River water to flow into Pyramid Lake. The Tribe and the United States have also planned and undertaken various physical improvements to facilitate restoration of the Pyramid Lake fishery. TCID App. A-14. These improvements directly affect the water requirements of the fishery. For example, the hatcheries can produce sufficient recruitment of fish to Pyramid Lake during severe droughts to eliminate the necessity for natural reproduction when water is most scarce. *See* TCID App. A-59 to A-60. The Marble Bluff Dam and Fishway make it possible for fish to ascend to their spawning grounds with much less water than it would take to migrate across the natural channel of the river. 23 Tr. 4202. App. 7a. All three of these approaches are related because physical improvements and conservation practices provide water that might otherwise have to be obtained through enforcing legal rights and priorities.

Several cases dealing with the use and control of the waters of the Truckee and Carson Rivers are pending before the lower federal courts. The outcome of these suits could provide some, or perhaps even all, of the water that is sought in this action.

Two of the pending cases concern the operation of the Newlands Project. From 1926 through the mid-1960s, TCID operated the Project, including Derby Dam and the Truckee Canal diversion facilities, with a free hand.[6] In

[6] In 1926, the United States and TCID entered into a contract pursuant to which TCID operates the physical facilities of the project, including Derby Dam and the Truckee Canal. TCID App. A-9.

1967, the Secretary of the Interior promulgated regulations, 43 C.F.R. § 418, which "initiate[d] Departmental controls, lacking in the past, to limit diversions by TCID from the Truckee River within decreed rights, and thereby make additional water available for delivery to Pyramid Lake." 43 C.F.R. § 418.1(b).[7] These regulations are predicated in part on the obligation of the United States as trustee "to protect and preserve the rights and interests of the Pyramid Lake Tribe of Indians in the Truckee River and in Pyramid Lake." *Id.* They were designed to implement both the Truckee and Carson River water right decrees. 43 C.F.R. §§ 418.1(b), 418.2(c), 418.3(a), 418.5.

The Secretary's operating criteria and procedures promulgated pursuant to the regulations in 43 C.F.R. § 418 were challenged by the Tribe and set aside in *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252. The district court noted the project's "antiquated system" for delivering water and TCID's wasteful practices which "caus[e] substantial and wholly unnecessary diversion of water from the Truckee River to the obvious detriment of the Tribe." These practices include inadequate or non-existent measuring devices at the farm headgates, a flat rate water pricing policy that discourages conservation, and deliveries of water to lands that do not have water rights. *Id.* at 257. After further proceedings, the Secretary was ordered to reduce the total maximum diversions to the Newlands Project by more than 100,000 acre feet, from 406,000 acre feet established in the 1967 regulations to 288,129 acre feet in 1974 and succeeding years. *Id.* at 260-62.

The controversy over the Secretary's operating criteria has continued. TCID refused to comply with the criteria

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[7] The diversion and release of water for the single purpose of generating hydroelectric power during the winter months was prohibited. 43 C.F.R. § 418.4(h).

published in 1973 and succeeding years. Consequently, in September, 1973 the Secretary of the Interior terminated the government's 1926 contract with TCID and gave notice of the government's intent to take back operational control of the project works, including Derby Dam.

TCID filed suit in March, 1974 challenging the validity of the contract termination and the post-1973 operating criteria. *Truckee-Carson Irrigation District v. Secretary of the Interior*, Civil No. R-74-34 BRT (D. Nev.). The Pyramid Lake Tribe was permitted to intervene as a defendant in that suit for the purpose of seeking to uphold the validity of the Secretary's termination of the 1926 contract and of the post-1973 operating criteria. The case has been tried, briefed, and argued and is awaiting decision by the district court.

United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877 (D. Nev. 1980), *appeal pending*, Nos. 81-4084, 81-4116 (9th Cir.), will also affect the quantity of Truckee River water that is diverted away from Pyramid Lake and to the Newlands Project. The district court held that the water duties for Newlands Project lands, measured at the delivery point of each farm, are 3.5 acre feet per acre for bottom lands and 4.5 acre feet per acre for bench lands. On appeal, the United States contends that the water duty is no more than 3 acre feet per acre.[8] Taking conveyance losses into account, this difference, applied to 60,000 acres of irrigated land below Lahontan Reservoir, translates into a gain or loss for Pyramid Lake and the Newlands Project of more than 65,000 acre feet per year.[9]

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[8] The case was argued to the Court of Appeals for the Ninth Circuit in May, 1982, and is now under submission.

[9] The water duty question at issue in the *Alpine* case has a direct bearing on the Secretary of the Interior's operating criteria being challenged in Truckee-Carson Irr. Dist. v. Secretary of the Interior, *supra*, because the Secretary's criteria are based on the water duties established in the applicable decrees. *Supra*, at 4-5.

Other pending cases affect the use and operation of Stampede Reservoir,[10] excessive diversions to agricultural lands in the Truckee Meadows (the area surrounding Reno and Sparks),[11] and making use of the unused portion of the Pyramid Lake Tribe's decreed irrigation right for fishery purposes.[12] The "lavish" consumption of water in Reno and Sparks[13] would be curtailed significantly simply by repealing the Nevada law, Nev. Rev. Stat. § 704.230, which prohibits the installation of residential water meters in Reno and Sparks and the implementa-

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[10] *See* Carson-Truckee Water Conservancy Dist. v. Watt, 537 F. Supp. 106 (D. Nev. 1982). This case has been fully briefed, and argued. The issues identified and left open in the published decision are now under submission.

[11] The *Orr Ditch* final decree has been enforced in this area only twice since 1944. TCID App. A-15. Evidence introduced at the trial revealed that the actual diversions greatly exceed the quantity authorized by the decree. For example, authorized diversions in 1974 for Steamboat Canal and Coldron Ditch were 23,526 and 1,853 acre feet respectively. Actual diversions in that year were 40,908 and 7,618 acre feet. App. 8a, 9a.

In 1976, the Justice Department requested that the Federal Water Master limit diversions in the Truckee Meadows to the quantities specified in the *Orr Ditch* decree. In response, the Water Master filed a petition with the district court requesting instructions. That matter is pending. United States v. Orr Water Ditch Co., Equity No. A-3 76-1 (D. Nev.).

[12] Under the *Orr Ditch* decree, the Pyramid Lake Tribe has a right to approximately 30,000 acre feet of Truckee River water per year for agricultural purposes. *See* Nev. App. 57a-58a. But the Tribe has been able to utilize only about 5,000 acre feet owing to the government's failure to construct an irrigation system to serve those lands. *See* TCID App. A-7 to A-9, A-15, A-20 to A-27. In 1979, the United States and the Tribe petitioned the *Orr Ditch* court for permission to use the unused portion of the Tribe's agricultural right for fishery purposes. This matter is also pending. United States v. Orr Water Ditch Co., Equity No. A-3-2 (D. Nev.).

[13] *See* H.R. Doc. No. 181, 84th Cong., 1st Sess. 17 (1955) (pointing out the waste of water caused by the absence of water meters in Reno and Sparks).

tion of a water pricing policy that encourages conservation instead of the current, state-mandated flat rate system.[14]

These half-dozen related proceedings hold out the prospect that most, if not all, of the additional water required for the Pyramid Lake fishery can be obtained without significantly interfering with the legitimate and efficient use of water pursuant to the *Orr Ditch* decree.

ARGUMENT

I. THERE ARE NO LEGAL ISSUES THAT WARRANT REVIEW

A. Res Judicata

The facts and circumstances depicted in the Petitions for Certiorari do not exist. The petitioners have distorted the facts of the case and the findings of both the district court and the court of appeals in a transparent effort to make this case fit a category for which it is plainly unsuited.

The rules regarding the application of res judicata and collateral estoppel between the Tribe and TCID are simple and straightforward.

> Parties who are not adversaries to each other under the pleadings in an action involving them and a third party are bound by and entitled to the benefits of issue preclusion with respect to issues they actually litigate fully and fairly as adversaries to each other and which are essential to the judgment rendered.

Restatement (Second) of Judgments § 38 (1982). *See also Restatement of Judgments* § 82 (1942):

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[14] Although Nev. Rev. Stat. § 704.230 does not mention Reno and Sparks by name, its terms limit its application to those two cities. Carson City and Las Vegas, Nevada's two other substantial urban population centers, are metered. Their charges for water are based on the amount consumed by each customer as opposed to the flat rates in Reno and Sparks.

> The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have an opportunity to litigate, between themselves.

This rule has its roots in our adversary system of justice. "The concept of adversarial litigation is that determination of issues is not full and fair unless a party has an opportunity to present proofs and argument specifically directed to the matters in controversy." *Restatement (Second) of Judgments*, *supra*, § 38, Comment a at 378. "The reason for this rule obviously is the same as that which underlies the whole doctrine of res judicata. . . ." 1 *Freeman on Judgments* § 422 (5th ed. 1925).

Since the interests of both TCID and the Tribe were represented by the United States as plaintiff in *Orr Ditch*, the petitioners acknowledge, as they must, that TCID and the Tribe were not adversaries. TCID Pet. 12-13; Nev. Pet. 11-12. Thus, in order to be able to take advantage of the preclusion defense, petitioners must show that the Tribe's claimed water right for fishery purposes was actually litigated or that there was a full and fair opportunity to litigate that issue in the *Orr Ditch* litigation.

The petitioners apparently recognize the necessity of satisfying these requirements since they contend: (i) that the issue was actually litigated, TCID Pet. 11 n.3;[15] (ii) that there was an opportunity to litigate the issue because the United States ceased representing TCID's interests after 1926, TCID Pet. 5 nn.2, 7; Nev. Pet. 5; and (iii) that the Tribe was afforded a full and fair opportunity to litigate its claim, TCID Pet. 12 n.4. *See also* TCID Pet. at 13, 16-17 (acknowledging the necessity of finding that there was a full and fair opportunity to

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[15] *See also* Nev. Pet. 3-4.

litigate the issue). Indeed, all of the state and federal cases cited by the petitioners (TCID Pet. 14-16; Nev. Pet. 12-13) which are said to conflict with the decision below uphold the preclusion defense asserted by one co-party against another with respect to an issue that was actually litigated.

These rules and authorities do not fit this case, however, for three basic reasons. First, the district court expressly found that the fishery water right was not actually litigated in *Orr Ditch*. TCID App. A-104. This finding was not challenged on appeal, but the court of appeals expressly noted its agreement with the district court in the process of rejecting TCID's res judicata defense. TCID App. A-55. It is far too late in this litigation for this factual issue to be raised or considered in this Court. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) (Court would not consider an issue that was not raised in the court of appeals); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635-36 (1967) (Court could not undertake to review concurrent findings of fact by two lower courts in the absence of an obvious and exceptional showing of error).

Second, the court of appeals also expressly rejected the allegation that the United States ceased representing the interests of the Newlands Project after 1926. "It [the government] never relinquished or limited its representation of the [Newlands] Project's interests." TCID App. A-55. This determination is fully consistent with the district court's findings that the government knowingly sacrificed the interests of the Pyramid Lake Indians, TCID App. A-77 to A-79, A-102, A-105, and clearly does not warrant review by this Court.

Third, contrary to the statements and implications in the Petitions, "[t]he Tribe and the [Newlands] Project were neither parties nor co-parties [in the *Orr Ditch* litigation;] . . . [t]hey were non-parties who were rep-

resented by the same government attorneys." TCID App. A-51. Since the Tribe was not a party and its nominal trustee, the United States, never relinquished or limited its representation of the entity whose interests were directly in conflict with those of the Tribe, *Orr Ditch* obviously did not and could not provide a full, fair, or a meaningful opportunity to litigate the Tribe's claimed water right for fishery purposes. TCID App. A-51 to A-52. *See* Tribe's Cross-Pet. 10-15.

Thus, contrary to the contentions of the petitioners and the dissenter, TCID Pet. 12-13, 16, 20, 22-23; Nev. Pet. 9, 11-12; TCID App. A-61 to A-62, the decision below does not rest on antiquated pleading practices. Nor is it inconsistent with any other decision of the federal or state courts. It simply applies the well-established rule pertaining to issue preclusion between non-adversaries that was very recently reaffirmed in Section 38 of the 1982 *Restatement (Second) of Judgments*. It did not hold that non-adversary parties could never be bound in a water rights adjudication or any other kind of case, but only that they can only be bound with respect to matters which were actually litigated or for which there was a full and fair opportunity to litigate. This is the precise holding of the cases cited by TCID, all of which preclude co-parties from relitigating issues that were previously determined.

In this case, however, the existence of the Tribe's fishery water right was not actually litigated in *Orr Ditch*, nor was there was a full and fair opportunity for it to be litigated owing to the government's actual representation of the Newlands Project's conflicting interests. *Cf. Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1233 (2d Cir. 1977), *cert. denied*, 434 U.S. 903 (non-party held bound by the results of an adjudication in which its representative had the non-party's interest "foremost in mind"); *Gerrard v. Larsen*, 517 F.2d 1127, 1134-35 (8th Cir. 1975) (case remanded for determi-

nation whether non-party "in fact participated fairly and adequately" in the prior litigation through its nominal representative). No authority known to us or cited by the petitioners or the dissent upholds the res judicata defense asserted by one co- or non-party against another when the claim or issue was not actually litigated, the co- or non-parties were represented by the same attorneys, and there was not a full and fair opportunity to litigate the issue.

The petitioners suggest that governmental conflicts in water and other property rights adjudications are routine occurrences and imply that some relaxation of traditional due process standards is therefore necessary. TCID Pet. 6-8, 18-20; Nev. Pet. 10.[16] There is a crucial difference, however, between representation of the government's own proprietary interests in national forests, national parks, wildlife refuges, military reservations, etc., and its representation of the property rights of others such as Indian tribes and water users on reclamation projects. No one other than the United States has a property interest or a "legitimate claim of entitlement" to the water rights appurtenant to the lands and reservations owned exclusively by the federal government. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), *quoted at* TCID App. A-40. Consequently, procedural due process concerns do not arise in that context. *Id.*

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[16] United States v. California & Oregon Land Co., 192 U.S. 355 (1904), does not support that contention. The affected Indians were not parties to that suit, no governmental conflict of interest was claimed, no due process issues were raised or considered, and no issues involving non-adversaries was presented. Heckman v. United States, 224 U.S. 413 (1912), also cited by Nevada (Pet. 10-11), does not address the situation in which the government's purported representation of Indians is marred by a conflict of interest, TCID App. A-45 n.18, nor does it provide any guidance in cases involving claim or issue preclusion between co-parties or non-parties.

But due process obviously is an issue when there are conflicts between the government's proprietary claims and the interests that it asserts in a representative capacity, or between the interests of two or more beneficiaries whose interests are represented by the United States. In such cases, the simple solution is to join the beneficiaries as parties in order to insure that their interests are fully and adequately represented. *See New Mexico v. Aamodt*, 537 F.2d 1102, 1106-07 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121; TCID App. A-64 n.1.[17] The right, power and capacity of Indian tribes to appear in court and to litigate on their own behalf, against third parties as well as the United States, was well established prior to the *Orr Ditch* trial. *United States v. Candelaria*, 271 U.S. 432, 438 (1926); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902); *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641 (1890); *Eastern Band of Cherokees v. United States*, 117 U.S. 288 (1886). And "[f]or more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1864)). There are no reasons for relaxing or for excusing the failure to comply with these constitutional requirements.

In short, the court of appeals applied well-established, up-to-date principles in concluding that the Tribe is not barred from asserting an unlitigated claim against a fellow non-party, both of whose interests were represented by the same government attorneys. The existence of the Tribe's fishery water right was not, and could not have been, adjudicated against TCID in that setting.

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[17] In this case, for example, TCID and other representatives of the class of water users on the Newlands Project were named as defendants and the Tribe intervened as a plaintiff.

The petitioners' real quarrel is with the lower courts' factual determinations. But while petitioners might wish that they were different, we are not told how or why any of those findings are "clearly erroneous." Nor do they provide any special or important reasons for granting review.

B. Administrative Extinguishment

TCID urges an alternative ground for reversal of the court of appeals' decision, that the Secretary of the Interior extinguished the Tribe's fishery water right for the benefit of the Newlands Project by entering into the Truckee River Agreement. TCID Pet. 24-29. This issue does not warrant review at this time for several reasons.

First, the Truckee River Agreement, unlike the water rights agreement at issue in the *Ahtanum* litigation on which TCID relies (*United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 330 F.2d 897 (9th Cir.), 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924), does not purport to extinguish, nor does it even mention, the Tribe's water right for fishery purposes. *See* TCID App. A-110 *et seq.* Neither of the lower courts construed the Truckee River Agreement as constituting such an extinguishment. In fact, the district court held that the Tribe's claimed water right had been extinguished prior to 1935 when that Agreement was executed. TCID App. A-92 to A-93. Given the applicable rules of construction, *see United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941), it is extremely doubtful that any court would hold that the Tribe was divested of its most cherished and valuable asset by virtue of an agreement in which it was not even mentioned. In any event, in the absence of the lower court's construction of the Agreement the issue plainly is not ripe for review by this Court. *See, e.g., Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 466 (1980); *Connecticut Light and Power Co. v. FPC*, 324 U.S. 515,

532-35 (1945) ("It is not for us to make an original appraisal of the facts.").

Second, the court of appeals expressly held that "the Reclamation Act [does not] confer authority to acquire water for a reclamation project by extinguishing federal water rights reserved for other purposes." TCID App. A-23. Neither petitioner takes issue with this holding. But TCID contends that notwithstanding this express limitation in the statute governing the acquisition of water rights for federal reclamation projects, the Secretary can achieve the identical, prohibited result pursuant to the general delegation of authority to manage Indian affairs. 25 U.S.C. §§ 2, 9 (1976). Any such construction of these laws is precluded by the rule that the terms of a more specific statute take precedence over the more general one. *Busic v. United States*, 446 U.S. 398, 406 (1980); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

Third, no conflict is claimed with the decisions of any other court, and the Ninth Circuit's holding is clearly correct. The power to convey Indian lands must be bestowed by specific grants. General delegations of authority do not suffice. *Sioux Tribe v. United States*, 316 U.S. 317, 326 (1942); *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. at 353-56. *See also* 18 Op. Att'y Gen. 235, 238 (1885), *cited with approval in Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 321 (1927). *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962), holds that 25 U.S.C. §§ 2 and 9 do not delegate general authority over Indians and their property to the Secretary of the Interior and is therefore fully consistent with the Ninth Circuit's disposition. *See also United States v. Mitchell*, 445 U.S. 535 (1980); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 664-66 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038.

C. Congress' Action and Inaction

Nevada urges the dissenter's view that the Tribe's case has somehow been prejudiced because the problem was brought to the attention of a congressional subcommittee holding oversight hearings and no action was subsequently taken by the Congress. Nev. Pet. 13; TCID App. A-64 to A-65. TCID seeks aid for its position from Congress' 1952 enactment of the McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666 (1976), as applied in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Pet. 12, 18, 23-24. Neither position is tenable.

Courts are the traditional forums for adjudicating water rights and for determining the preclusive effects of prior judgments. While the Pyramid Lake problem has certainly been mentioned in congressional oversight hearings, no legislation has been introduced to settle it one way or the other. Indeed, the two Senators who conducted the oversight hearings cited by Nevada and the dissenter expressly stated their belief that the controversy should be resolved by the courts, not by the Congress. 119 Cong. Rec. 1018 (1973), App. 10a-11a. Under these circumstances, nothing can be read into the lack of congressional action. No authority known to us or cited by the petitioner holds that the mere existence of congressional oversight hearings has any effect on a judicial decision.

TCID's reliance on the policies underlying the McCarran Amendment, 43 U.S.C. § 666, is just as obviously misplaced. That law was enacted in 1952, eight years after the entry of the *Orr Ditch* final decree, thirty-nine years after *Orr Ditch* was initiated. Applying that statute retroactively to divest the Tribe of its property rights violates the first rule of statutory construction. *Greene v. United States*, 376 U.S. 149, 160 (1964). *See also* Tribe's Cross-Pet. at 16-17.

D. Impact on the West

Both petitioners as well as the dissenter raise the specter of water and other adjudications throughout the West being reopened as a result of the court of appeals' decision. Nev. Pet. 11-12; TCID Pet. 8, 13, 29, 30; TCID App. A-64. Significantly, however, not one such instance is described.[18] At oral argument before the court of appeals, counsel for the United States represented that so far as the Interior and Justice Departments were aware, this case is unique; there is no other situation in which an Indian tribe's claim was not asserted by the United States owing to the government's conflict of interest.[19] In the absence of any evidence to the contrary, there is no reason to believe that the court of appeals' specific holding regarding the respective rights of the Tribe and TCID will have any ramifications beyond the confines of this most unusual controversy.

II. THIS CASE SHOULD NOT BE REVIEWED IN ITS CURRENT INTERLOCUTORY POSTURE

The court of appeals remanded the case to the district court for determinations of the ultimate issues in this litigation, whether the Tribe is entitled to a water right for its fishery and, if so, the amount of water that is necessary to satisfy that right. TCID App. A-59. As noted *supra* at 4-8, several cases are pending in the lower courts which will have a substantial effect on the

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[18] The dissenter points to one Arizona water case "which is not within the scope of today's decision." TCID App. A-64 n.1.

[19] It is highly doubtful that any such instance would have escaped notice. In 1971-72, the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary held extensive hearings throughout the West concerning Federal Protection of Indian Resources. 92d Cong. 1st Sess. (Comm. Print 1972). *See* TCID App. A-64 to A-65. The six volume record of those hearings includes extensive testimony, other materials, and two detailed articles documenting numerous governmental conflicts. But no one has uncovered anything resembling the Pyramid Lake travesty.

availability of water to meet the Tribe's entitlement and the legitimate needs of the Newlands Project. Further, the Bureau of Reclamation has proposed a program of physical improvements for the Newlands Project that is expected to save almost 50,000 acre feet per year. There is also some hope that a negotiated settlement will be achieved and implemented through legislation. *See* 128 Cong. Rec. S4826 (daily ed. May 11, 1982) (remarks of Senator Laxalt), App. 11a-13a. All of these factors counsel against this Court's intervention at this fluid stage of the controversy. *See, e.g., Brotherhood of Locomotive Firemen & Engineers v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967) (case not ripe for Supreme Court review prior to determination of remanded issues); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ [of certiorari] is not issued until final decree").

This Court has noted the vital importance of conserving the West's most precious and scarce resource. *See, e.g., Sporhase v. Nebraska*, —— U.S. ——, 50 U.S.L.W. 5115, 5118-19 (No. 81-613, July 2, 1982); *Wyoming v. Colorado*, 259 U.S. 419, 484 (1922). Unfortunately however, waste is prevalent throughout the Truckee and Carson River watersheds. Excessive agricultural diversions must be stopped; water meters must be installed; conservation must be encouraged through financial incentives; and wasteful irrigation practices must be eliminated. But motivation was lacking to do any of these things as long as there was plenty of water to meet the needs of everyone but the Indians.

The court of appeals' decision has changed all of this. Now, for the first time, there is reason to conserve and to become efficient. TCID and Newlands Project water users will no longer tolerate excessive agricultural diversions in the Truckee Meadows or the existence of a state law that mandates an unmetered, flat rate water delivery system in Reno and Sparks. Powerful political leaders

have come forward with practical proposals that offer real solutions to what is now being perceived as a pressing problem. Positive and constructive forces are now at work trying to figure out ways and means of stretching and conserving available supplies in order to meet all legitimate needs, including those of the Pyramid Lake fishery. Premature intervention by this Court at this interlocutory stage could set back the considerable progress that has already been achieved.

The Pyramid Lake Tribe filed a Cross-Petition for Certiorari challenging the lower courts' conclusion that res judicata bars the Tribe's claims against the defendants in this case other than TCID and the water users of the Newlands Project. That Cross-Petition is conditioned on granting the petitions filed by Nevada and/or TCID. The Tribe strongly opposes review at this time for two practical reasons. First, the depletions caused by Truckee River diversions to the Newlands Project are more than twice as much as those of all of the other Truckee River water users combined. *Supra* at 2-3. The Tribe is confident that its full entitlement can be satisfied by confirming its right to the waters that have historically flowed into Pyramid Lake, implementing conservation and improved management practices, taking full advantage of physical and technological improvements and reducing diversions to the Newlands Project. *See supra* at 2-8.

Second, in addition to being the largest diverters of Truckee River water, TCID and Newlands Project water users are also, for all practical purposes, the appropriators with the most junior rights. *See supra* at 2. This means that virtually all of the other defendants do not need the protection afforded by res judicata because their rights are senior to TCID's and would not be affected by the Tribe's right unless and until all TCID diversions are eliminated. *See Cappaert v. United States*, 426 U.S. 128, 139 n.5 (1976); *Arizona v. California*, 373 U.S. 546, 555-

56 (1963). As a practical matter, this controversy is and always has been between the Tribe and TCID.[20] Contrary to TCID's suggestion (Pet. 6, 12), the ultimate impact of the litigation on TCID would not be any different if the Tribe is able to assert and enforce its right against all of the defendants.

Since the Tribe's rights can be satisfied out of the rights decreed to the United States in the *Orr Ditch* litigation, and the rights of virtually all the other defendants are superior to TCID's, and TCID retains its superior position vis-a-vis the relatively few and minor subsequent appropriators, no practical purpose would be served by reviewing the court of appeals' decision upholding the res judicata defense of all defendants other than TCID.

III. NEVADA LACKS STANDING TO PETITION FOR CERTIORARI

As noted *supra* at 3, Nevada successfully obtained an order dismissing it from this lawsuit in its *parens patriae* capacity. App. 3a-6a. Yet it now purports to reappear in that capacity for the purpose of seeking review of the court of appeals' holding that is detrimental to TCID and Newlands Project water users. Nev. Pet. 9. Although Nevada states that it can act in its *parens patriae* capacity at any time it chooses, Nev. Pet. 9 n.4, no authority is cited in support of that novel claim and we do not know of any order, rule, or decision that permits a party to change or add roles, *sua sponte*, at its whim. *Contrast* Fed. R. Civ. P. 21. Accordingly, Nevada's Petition, No. 81-2245, should be summarily denied because Nevada lacks standing to petition on TCID's behalf.

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[20] The January 5, 1982 Order amending the court of appeals' initial decision makes clear that TCID retains rights that are superior to those of subsequent, *i.e.*, post-1902, appropriators. TCID App. A-68.

CONCLUSION

The Petitions for Certiorari should be denied.

Respectfully submitted,

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August, 1982

APPENDIX

16 Tr. 2540-41:

Q. And what is the approximate total magnitude, then, of all of the rights decreed in the Orr Ditch Case with priorities subsequent to the Newlands Project?

A. 191,000.

Q. No, subsequent.

A. Subsequent to the—

Q. Subsequent to 1902, after 1902?

A. Well, we, after assuming this flow, or this, a diversion right under the July 2nd right, we ended up with a total flow of 262,753 acre feet accumulated.

Q. What are the total amounts of rights that are decreed with priorities after that?

A. Well, it's a very small amount. We accumulated up to 266,428 as all of the rights up to the 1902 rights, and then we did not know how to accumulate anything further.

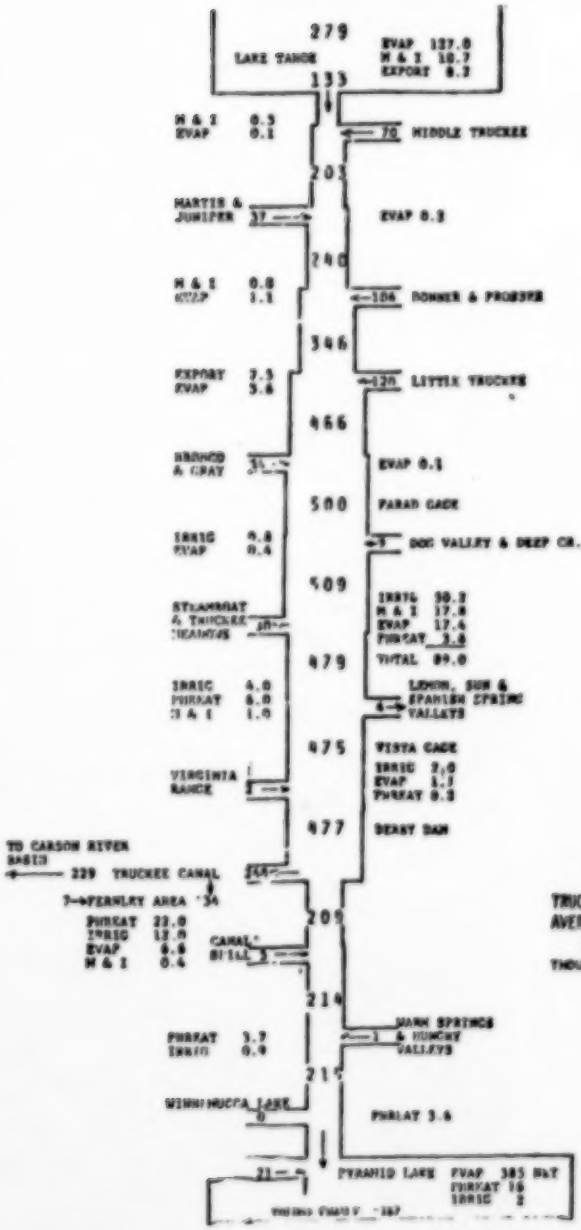
Q. So that the total of all of the rights with priorities after 1902 would be about 4,200 or so, diversion rights?

A. Yes.

Q. From all sources, tributaries?

A. From all sources, yes.

EXHIBIT U-621



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987-JBA
UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

[Filed May 2, 1975]

ORDER GRANTING MOTION TO DISMISS

Defendant, STATE OF NEVADA, on August 15, 1974, filed herein a Motion to Dismiss this action against it insofar as it has been sued as parens patriae for its citizens. The basis for said Motion is that the Complaint fails to state a claim upon which relief can be granted.

Paragraph II of the Complaint herein states: "The State of Nevada is named as a party defendant in this action in its proprietary capacity, in its governmental capacity as the issuer of permits to appropriate unappropriated waters, and as *parens patriae* for its citizens". The State's Motion to Dismiss has been directed solely at its being named as party Defendant in the capacity of parens patriae for its citizens, and this Order Granting Motion to Dismiss applies only to the action against the State in said capacity.

In deciding this Motion, the Court has had before it the pleadings on file and memoranda of points and authorities setting forth the legal arguments both in support of and opposed to the granting of the motion. In addition,

a full hearing on the Motion was held in open Court on April 21, 1975, so that the Court feels the issue has been fully presented.

Basically, this is a quiet title action. It is apparent there are competing and conflicting interests among various citizens of Nevada, including the Indians of the Pyramid Lake Paiute Tribe and the people of the Newlands Project, and the State itself. Under such circumstances, it would be improper for the State to be required to act as parens patriae for its citizens.

The questions of who should be served with process and the manner of such service hinge, in part, on whether the State of Nevada is a party defendant as parens patriae for its citizens. It is axiomatic that the earliest possible final determination of this issue should facilitate the final disposition of the entire case. Therefore, the Court expressly determines that there is no just reason for delay in entering a final judgment dismissing the action against the State as parens patriae for its citizens.

There is no possible way the Complaint could be amended to afford relief against the State as parens patriae for its citizens.

THEREFORE, IT IS HEREBY ORDERED that defendant, State of Nevada's Motion to Dismiss the action against it insofar as it has been sued as parens patriae for its citizens be granted, without leave to amend the Complaint herein.

IT IS FURTHER ORDERED that a final judgment granting the State's Motion be entered in accordance with the requirements of Rule 54(b), Fed. R. Civ. P.

DATED: April 29, 1975.

/s/ J. Blaine Anderson
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

[Filed May 2, 1975]

RULE 54(b) CERTIFICATE

With respect to the issue determined by the Judgment of Dismissal to which this Certificate is attached, in accordance with Rule 54(b), Fed. R.Civ.P.,

IT IS CERTIFIED:

(1) That the Court has expressly directed the entry of final judgment on the motion to dismiss the action against defendant, State of Nevada, in its capacity as parens patriae for its citizens.

(2) That the Court has expressly determined that there is no just reason for delay.

DATED: April 29, 1975.

/s/ J. Blaine Anderson
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

[Filed May 2, 1975]

JUDGMENT OF DISMISSAL

In accordance with the provisions of the Order Granting Motion to Dismiss this day granted herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-entitled action against the STATE OF NEVADA IN ITS CAPACITY AS PARENS PATRIAE FOR ITS CITIZENS, and only in said capacity, be and the same hereby is, dismissed without leave for the plaintiff to amend its Complaint.

IT IS FURTHER ORDERED that the Rule 54(b) Certificate attached hereto be deemed incorporated into this Judgment of Dismissal by this reference thereto.

DATED: April 29, 1975.

/s/ J. Blaine Anderson
U.S. District Judge

23 Tr. 4202

Q You estimated that a flow of fifty cubic feet per second would be, in your opinion, sufficient for the fish to get from the mouth of the river above Marble Bluff. What, in your opinion, would have been—would be necessary without Marble Bluff Dam and fishway, what kinds of flows?

A Without it?

Q Yes, would be required to get the fish out of the lake and into the river past the site of Marble Bluff Dam?

A Well, all I could do is go on the basis of when we've had runs come up in the past, when there wasn't a Marble Bluff Dam. Like this year, for example, we had a run come up this year. Now, if you've got the figures for the flow this year, we know that they could get up this year during March. We've seen them, I think, get up with flows in the neighborhood of five to six hundred second-feet. If you get too much water, then they can't get up, because there's just too much turbulence on that delta.

EXHIBIT U-610

8a

TRUCKEE RIVER DIVERSIONS
STEAMBOAT TO GLENDALE
1974

Month	JAN.	FEB.	MAR.	APR.	MAY.	JUN.	JUL.	AUG.	SEP.	OCT.	NOV.	DEC.	TOTAL:
Ditch Name	A.F.	A.F.	A.F.	A.F.	A.F.	A.F.	A.F.	A.F.	A.F.	A.F.	A.F.	A.F.	A. F.
STEAMBOAT.....				3860	6262	5560	6176	6488	6472	6090			40,908
COLDRON.....				1068	1390	1362	1470	1504	824				7,318

EXHIBIT U-628

DITCH	Diversion Season In Acre Feet	Transport-Loss In Percent	Delivered Season In Acre Feet
Steamboat Canal	23,526	30	16,468
Coldron Ditch	1,853	25	1,390

119 Cong. Rec. 1018 (1973)

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent to insert in the RECORD a joint statement by Senators KENNEDY, TUNNEY, and CRANSTON.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

JOINT STATEMENT OF SENATORS KENNEDY, TUNNEY, AND CRANSTON REGARDING PYRAMID LAKE

In 1859 the United States created the Pyramid Lake Indian Reservation in Nevada for the Pyramid Lake Paiute Tribe of Indians. The heart of the Reservation—geographically, culturally, and economically—is Pyramid Lake. The lake is not only the single most important asset of the Tribe, which has lived on its shores and depended on its fishery but it is also a natural resource from time immemorial, of unique importance to the country generally. But presently Pyramid Lake, and the Tribe, are in trouble.

Pyramid Lake is the terminus of the Truckee River, which, except for a small amount of precipitation and drainage from surrounding mountains, is the sole source of water for the Lake. Yet, as a result primarily of man-made upstream diversions of Truckee River water, the level of the Lake has dropped more than 70 feet since 1906. This decline in the Lake has devastated its natural fishery, threatens recreation development which would benefit both the Tribe and all citizens of this nation.

Recognizing that the Lake's existence is in peril and with the full support of the Tribe, the Department of Justice filed suit in the Supreme Court on behalf of the Tribe in September of last year. The suit asked the Court to assume original jurisdiction of a suit against California and Nevada and to declare the Pyramid Lake Tribe's right to Truckee River water in a sufficient

amount to stabilize the level of the Lake and to maintain a natural fishery in the Lower Truckee River.

This suit is long overdue. For years, according to testimony and evidence presented in hearings before the Senate Subcommittee on Administrative Practice and Procedure last year, the Justice Department and Interior Department have been passing the buck back and forth, giving lip service to the plight of the Tribe and the demise of the Lake, but refusing to take concrete action to preserve them. In the past the federal government has abdicated its trust responsibilities to the First Americans through incredible conflicts of interest. This suit should become a symbol of the Government's concern for and action in behalf of the best interests of Indian people. It is our hope that at last the Government will act meaningfully to fulfill its trust responsibility to this American Indian Tribe.

It seems that the Tribe cannot fully be protected until there is a judicial determination of the amount of Truckee River water subject to allocation between California and Nevada and the amount to which the Pyramid Lake Paiute Tribe is entitled. Administrative or Congressional action would otherwise be premature, in that it would only be based on a speculative determination of the Tribe's rights. We therefore support the efforts of the Tribe and Federal Government to obtain a judicial determination in the Supreme Court.

128 Cong. Rec. S4826 (May 11, 1982) (daily ed.)

Mr. LAXALT. Mr. President, I wish to express my full support for H.R. 5118 and I can appreciate what my colleague (Mr. GOLDWATER) says about long years of delicate and sensitive negotiations. In northern Nevada, we have a similar problem with regard to water rights. Ours involved the Pyramid Lake Paiute Indian Tribe, the Truckee-Carson Irrigation District (TCID), and the Bureau of Reclamation. We, too, have lawsuits hanging over

our heads and we are very anxious to bring about some sort of a satisfactory and acceptable settlement.

At the heart of this dispute is the amount of water that will be made available to Pyramid Lake. It has been determined that an average annual inflow of 385,000 acre feet per year from the Truckee River is needed to maintain the Pyramid Lake at its current level, plus or minus 10 feet, and meet Endangered Species Act obligations.

The Truckee-Carson Irrigation District (TCID) operates the Federal newlands reclamation project. Basically cattle oriented, the 73,000 acre tract is owned and farmed by 2,000 individuals.

In the early 1960's, the Pyramid Lake Paiute Tribe became interested in greatly increasing the flows of Truckee River water to Pyramid Lake, which is on reservation land, for fishery purposes. Any increased flows to Pyramid Lake would necessitate taking away water that was presently being used by someone else. Since the Truckee-Carson Irrigation District was the largest upstream user, efforts to obtain more Truckee River water for the lake have been aimed at the newlands project.

For over a year, the Bureau of Reclamation has been attempting to negotiate a settlement between the tribe, the TCID, and the Bureau. The Bureau has proposed a "Rehabilitation and Betterment Program" for the newlands project, costing approximately $15.5 million which they estimate will save 45,750 acre-feet of water per year.

I am very pleased to say that the TCID has offered to relinquish to the Pyramid Lake Tribe 31,000 acre-feet per year from the 406,000 they claim plus the savings realized through the R. & B. proposal in return for all litigation being dropped. This offer is on the table and I am in great hopes that all affected parties, the Indians, the TCID, and the Bureau will begin earnest negotiations

so that we may soon come before Congress with our own settlement legislation.

Mr. GOLDWATER. Mr. President, hopefully, given the importance of this issue to northern Nevada and the fact that the irrigation district has made a proposal for the settlement of this dispute, the affected parties will sit down and start some serious dialog. The Senator's involvement and leadership can be very instrumental in the negotiation process and in the development of legislation, and I, of course, am only too glad to support his efforts.